Supreme Court, U.S.
FILED
NOV 17 2010
OFFICE OF THE CLERK

Nos. 09-1298, 09-1302

In The
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

THE BOEING COMPANY, SUCCESSOR TO MCDONNELL DOUGLAS CORPORATION,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR AL-HARAMAIN ISLAMIC FOUNDATION, INC., WENDELL BELEW, ASIM GHAFOOR, AND ELECTRONIC FRONTIER FOUNDATION AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE COURT NEED NOT ADDRESS THE ISSUE OF WHETHER THE STATE-SECRETS PRIVILEGE HAS A CONSTITUTIONAL BASIS	5
II. THE STATE-SECRETS PRIVILEGE IS A COMMON-LAW EVIDENTIARY RULE OF NONCONSTITUTIONAL PROVENANCE	8
A. The State-Secrets Privilege is an Evidentiary Rule Rooted in the Common Law of England and Scotland	8
B. The Majority View Among the Lower Federal Courts is that the State-Secrets Privilege is a Judge-Made Evidentiary Rule Without Foundation in the Constitution	13
C. The Confluence of the State-Secrets Privilege and Article II Duties Does Not Give the Privilege a Constitutional Provenance	16
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) 11, 13, 18

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) 16

Beatson v. Skene, 5 Hurlst. & N. 838 (1860) 9

Doe v. Central Intelligence Agency, 576 F.3d 95 (2d Cir. 2009) 13

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 19

Duncan v. Cammel, Laird and Co., Ltd., [1942] A.C. 624 (1942) 9, 10

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) 11

El-Masri v. United States, 479 F.3d 296 (2d Cir. 2007) 16, 17

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 6

In re National Security Agency Telecommunications Records Litigation, 700 F. Supp. 2d 1182 (N.D. Cal. 2010) 2

In re National Security Agency Telecommunications Records Litigation, 564 F. Supp. 2d 1109 (N.D. Cal. 2008) 2, 3, 15, 18, 19

In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007) 11, 13

In re United States, 872 F.2d 472 (D.C. Cir. 1989) 13

TABLE OF AUTHORITIES – Continued

Page

Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998) 13

Mathews v. Eldridge, 424 U.S. 319 (1976).....6

McDonnell Douglas Corp. v. United States, 567 F.3d 1340 (2009).....5

McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003).....5, 12

McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 270 (1996).....5

Milwaukee v. Illinois, 451 U.S. 304 (1981).....2

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) 13, 14, 16

Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599 (2009).....4, 7

Monarch Assur. P.L.C. v. U.S., 244 F.3d 1356 (Fed. Cir. 2001).....13

Rex v. Watson, 171 Eng. Rep. 591 (K.B. 1817).....8

Roviaro v. United States, 353 U.S. 53 (1957) 6

Tenet v. Doe, 544 U.S. 1 (2005).....12

Totten v. United States, 92 U.S. 105 (1875).....12

United States v. Nixon, 418 U.S. 683 (1974).....5, 16, 17, 20

United States v. Reynolds, 345 U.S. 1 (1953) ....*passim*

United States v. U.S. Gypsum Co., 333 U.S. 364 (1948).....7

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991).....13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, § 5, cl. 3 20

U.S. CONST., amend. V 6

STATUTES

18 U.S.C. App. 3 15

50 U.S.C. §§ 1801-1810 2

50 U.S.C. §§ 1806(f) 15

RULES

Sup. Ct. R. 14(1)(a) 6

Sup. Ct. R. 24(1) 6

Sup. Ct. R. 24(2) 6

OTHER MATERIALS

Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) 8, 16

H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 15

S. Rep. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058 15

William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005) 8, 9

BRIEF FOR AL-HARAMAIN ISLAMIC FOUNDATION, INC., WENDELL BELEW, ASIM GHAFOOR, AND ELECTRONIC FRONTIER FOUNDATION AS AMICI CURIAE

INTRODUCTION

Amici curiae Al-Haramain Islamic Foundation, Inc., Wendell Belew, Asim Ghafoor, and the Electronic Frontier Foundation file this brief to address an issue the government has raised in opposition to certiorari in these consolidated cases and in a previous case before this Court: whether the state-secrets privilege has a constitutional basis in Article II. That issue is not presented here, and thus the Court should not address it. If the Court chooses to do so, however, the Court should conclude that the state-secrets privilege is a common-law evidentiary rule of nonconstitutional provenance.[1]

♦

INTEREST OF AMICI CURIAE

1. *The Al-Haramain Amici Curiae.* Amici curiae Al-Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor are the plaintiffs in *Al-Haramain Islamic Foundation, Inc. v. Obama*, No.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici curiae or their counsel, make a monetary contribution to the preparation or submission of this brief. The consent of the parties to the filing of amici curiae briefs has been obtained and filed with the Clerk of the Court.

C-07-0109 (N.D. Cal. filed February 28, 2006), which awaits the district court's rendition of final judgment following a summary judgment of liability against the President of the United States, the National Security Agency, the Office of Foreign Assets Control, and the Federal Bureau of Investigation for warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1810. *See In re National Security Agency Telecommunications Records Litigation*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

Prior to adjudicating liability, the district court in the *Al-Haramain* case ruled that "FISA preempts or displaces the state secrets privilege . . . in cases within the reach of its provisions." *In re National Security Agency Telecommunications Records Litigation*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008). In reaching that conclusion, the district court rejected the defendants' argument that the state-secrets privilege has a constitutional basis in Article II.[2]

[2] The *Al-Haramain* defendants' argument that the state-secrets privilege has a constitutional provenance was pertinent to determining the standard for deciding the preemption issue in that case. A federal statutory scheme preempts federal common law, even without explicit evidence of a clear and manifest purpose to do so, if Congress has "occupied the field through the establishment of a comprehensive regulatory program." *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981). In the *Al-Haramain* case, the defendants unsuccessfully argued "that the [state-secrets] privilege derives, not only from the common law, but also from the [P]resident's Article II powers, so that a 'clear

(Continued on following page)

Amici curiae anticipate that, if the *Al-Haramain* defendants choose to appeal the yet-to-be-rendered final judgment in that case, one of the questions presented on the appeal will be whether the state-secrets privilege has a constitutional basis in Article II. Amici curiae likewise anticipate that, in the present consolidated cases, the United States will argue in its merits briefing, as it did in opposition to certiorari, that the state-secrets privilege has a constitutional basis in Article II. If the Court's opinion includes a dictum addressing this question, it could affect the Ninth Circuit's decision of an appeal (if there is one) in the *Al-Haramain* case.

2. *Amicus Curiae Electronic Frontier Foundation.* The Electronic Frontier Foundation (EFF) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. Founded in 1990, EFF is based in San Francisco. EFF has more than 14,000 dues-paying members throughout the United States and around the world.

EFF serves as counsel in two cases arising out of the warrantless domestic dragnet surveillance conducted by the National Security Agency together with AT&T. In those cases, the Executive has asserted that the state-secrets privilege is a constitutionally-compelled rule which bars the Judiciary from

expression of congressional intent is required to abrogate that privilege. . . ." *National Security Agency Telecommunications Records Litigation*, 564 F. Supp. 2d at 1120.

adjudicating the lawfulness of the Executive's actions under the Constitution and under federal statute. Those two cases are currently pending in the Ninth Circuit. *Hepting v. AT&T*, No. 09-16676 (9th Cir.); *Jewel v. NSA*, No. 10-15616 (9th Cir.). Any dictum here addressing the constitutional question of whether the state-secrets privilege is an Article II limitation on the power of the courts could affect those cases.

♦

SUMMARY OF ARGUMENT

Despite repeated invitations from the government in opposing certiorari in these consolidated cases and in the government's brief in a previous case, *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), this Court need not and should not here address the issue of whether the state-secrets privilege has a constitutional basis. The resolution of that issue is not necessary to these cases' adjudication and is outside the scope of the question on which the Court has granted certiorari. If and when the Court addresses this issue, the Court should do so only after full, direct briefing in a case where the issue is squarely presented and not in a dictum here.

If, however, the Court does address in these cases the provenance of the state-secrets privilege, the Court should conclude, consistent with the majority view among the lower federal courts, that

the state-secrets privilege is a common-law evidentiary rule of nonconstitutional provenance.

♦

ARGUMENT

I. THE COURT NEED NOT ADDRESS THE ISSUE OF WHETHER THE STATE-SECRETS PRIVILEGE HAS A CONSTITUTIONAL BASIS.

In the present consolidated cases, neither the Court of Federal Claims nor the Court of Appeals for the Federal Circuit addressed the issue of whether the state-secrets privilege has a constitutional basis in Article II. *See McDonnell Douglas Corp. v. United States*, 567 F.3d 1340, 1345 (2009); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1020-24 (Fed. Cir. 2003); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270, 278-81 (1996). Nevertheless, the United States has raised this issue in its opposition to certiorari, asserting that "[t]he state secrets privilege is deeply rooted in both 'the law of evidence,' *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953), and the Executive's 'Art[icle] II duties' to protect 'military or diplomatic secrets,' *United States v. Nixon*, 418 U.S. 683, 710 (1974)." Brief for the United States in Opposition to Petitions for Writ of Certiorari at 12. Amici curiae anticipate that the United States may do so again in its merits briefing.

The resolution of this issue, however, is not necessary to the adjudication of the question on

which the Court has granted certiorari: whether the Due Process Clause of the Fifth Amendment permits the government to maintain a claim while simultaneously asserting the state-secrets privilege to bar presentation of a prima facie valid defense to that claim.[3] *See* Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); Sup. Ct. R. 24(1) & (2) (briefs on merits may not raise additional questions or change the substance of the questions presented). The extent of Fifth Amendment due process rights is determined by balancing "the governmental and private interests that are affected," *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), whether or not the governmental interest is constitutional in origin. This Court has applied the balancing test in both situations. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 527-31 (2004) (employing *Mathews* balancing test where government invoked constitutional war power to justify indefinite detention of enemy combatant); *id.* at 529 (*Mathews* test determines the process due "in any given instance"); *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (prescribing balancing test to determine scope of nonconstitutional informer's privilege).

[3] Nor do these cases present the question of whether or to what extent the government may invoke the state-secrets privilege to defeat a constitutional claim against the government.

Thus, amici curiae urge the Court not to address the provenance of the state-secrets privilege in a dictum here. Any pronouncement by this Court on the provenance of the state-secrets privilege should await a case presenting that issue, upon full briefing by the parties. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 411 (1948) (Frankfurter, J., concurring) ("Deliberate dicta . . . should be deliberately avoided.").

In *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), where this Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine, the United States submitted an amicus curiae brief which discussed the question – irrelevant in that case – whether the state-secrets privilege has a constitutional basis. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 28-29, *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009) (No. 08-678), 2009 WL 2028902 (arguing that the state-secrets privilege has constitutional grounding and performs a function of constitutional significance). The Court wisely refrained from including in its opinion any dictum addressing that question. The Court should do the same here.

If, however, the Court decides in these consolidated cases to address the provenance of the state-secrets privilege, the Court should conclude, for the reasons set forth below, that the state-secrets privilege is a common-law evidentiary privilege without foundation in the Constitution.

II. THE STATE-SECRETS PRIVILEGE IS A COMMON-LAW EVIDENTIARY RULE OF NONCONSTITUTIONAL PROVENANCE.

A. The State-Secrets Privilege is an Evidentiary Rule Rooted in the Common Law of England and Scotland.

The common-law provenance of the state-secrets privilege embodied in *United States v. Reynolds*, 345 U.S. 1 (1953) is described in two recent scholarly publications: William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92-101 (2005); and Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270-80 (2007).

Weaver and Pallitto explain that "[t]he state secrets privilege derives from crown privilege as it developed in the common law of England and Scotland." Weaver & Pallitto, *supra*, 120 POL. SCI. Q. at 97. Chesney describes an early example of the privilege's common-law provenance: the 1817 decision in *Rex v. Watson*, a prosecution for "an alleged plot . . . to overthrow the British government through a series of acts that would include an assault on the Tower of London," where the court excluded testimony by a tower employee attesting to the accuracy of a map of the tower because "'it might be attended with public mischief, to allow an officer of the tower to be examined as to the accuracy of such a plan.'" Chesney, *supra*, 75 GEO. WASH. L. REV. at 1274-75 (quoting *Rex v. Watson*, 171 Eng. Rep. 591, 604 (K.B. 1817)). Weaver and Pallitto describe another early example:

the 1860 decision in *Beatson v. Skene*, where it was said:

> "[I]f the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice. . . . It appears to us . . . that the question, whether the production of the documents would be injurious to the public service, must be determined not by the judge but by the head of the department having the custody of the paper."

Weaver & Pallitto, *supra*, 120 POL. SCI. Q. at 97-98 (quoting *Beatson v. Skene*, 5 Hurlst. & N. 838, 853 (1860)).

According to Weaver and Pallito, "the chief modern case on the issue of crown privilege" in the United Kingdom is the 1942 decision in *Duncan v. Cammel, Laird and Co., Ltd.*, in which "family members of submariners killed while putting the submarine Thetis through trials sued the manufacturer of the submarine and sought discovery of blueprints of the craft and other sensitive documents," but "[t]he Crown asserted privilege to protect the documents, and the Lords held that 'the approved practice . . . is to treat ministerial objections taken in proper form as conclusive.'" Weaver & Pallitto, *supra*, 120 POL. SCI. Q. at 98 (quoting *Duncan v. Cammel, Laird and Co., Ltd.*, [1942] A.C. 624, 641 (1942)). "The holding of *Duncan* conferred absolute authority on the executive

to withhold documents from disclosure in judicial proceedings." *Id.*

This Court's seminal decision in *Reynolds* on the state-secrets privilege relied largely on *Duncan* to prescribe the contours of the privilege. *See Reynolds*, 345 U.S. at 7-8. The Court explained that, while "[j]udicial experience with the privilege which protects military and state secrets has been limited in this country[,] English experience has been more extensive. . . ." *Id.* at 7. The Court cited *Duncan* as authority for several propositions: that invocation of the privilege requires "actual personal consideration" by the head of the department that has control over the matter, that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," and that the court must "do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8; *see id.* at nn.20-22.

In addition to citing the *Duncan* decision, *Reynolds* cited a handful of U.S. decisions that, according to *Reynolds*, demonstrate that the state-secrets privilege "is well established in the law of evidence." *Reynolds*, 345 U.S. at 6-7. Nowhere did the Court state that the privilege has a constitutional provenance.[4] *Reynolds*

[4] *Reynolds* characterized as having "constitutional overtones" the government's argument that "executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," as to which the government claimed "an inherent executive power

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is expressly rooted exclusively in the common-law construct of an evidentiary privilege.

The operation of the state-secrets privilege in *Reynolds* demonstrates its nature as a common-law evidentiary rule. As with any other common-law privilege, whether the state-secrets privilege applies is a matter for judicial, not executive, determination. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. In the application of the attorney-client privilege or any other common-law evidentiary privilege, the effect of the privilege is to exclude the privileged evidence. The same is true of the common-law state-secrets privilege: "The effect of the government's successful invocation of privilege 'is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.'" *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)); *accord, In re Sealed Case*, 494 F.3d 139, 144-45, 149-51 (D.C. Cir. 2007). That is what happened in *Reynolds*, where this Court said that,

which is protected in the constitutional system of separation of power," as well as the respondents' argument that "the executive's power to withhold documents was waived by the Tort Claims Act." *Reynolds*, 345 U.S. at 6 & n.9. However, the Court found it "unnecessary to pass upon" those arguments, "there being a narrower ground for decision." *Id.* at 6.

notwithstanding the government's successful invocation of the state-secrets privilege, "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." *Reynolds*, 345 U.S. at 11.[5]

[5] The state-secrets evidentiary privilege, which results only in the exclusion of evidence, is to be distinguished from the rule that a lawsuit is nonjusticiable if its "very subject matter" is an attempt to enforce duties arising out of a voluntary secret relationship between the plaintiff and the government. *See Tenet v. Doe*, 544 U.S. 1, 8 (2005); *Totten v. United States*, 92 U.S. 105, 107 (1875). In *Tenet*, this Court made clear that the nonjudiciability rule applies *only* to lawsuits seeking to enforce such duties. *See Tenet*, 544 U.S. at 3 ("the longstanding rule, announced more than a century ago in *Totten*, prohibit[s] suits against the Government based on covert espionage agreements"); *id.* at 8 ("*Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government"); *id.* at 9 ("*Totten's* broader holding [is] that lawsuits premised on alleged espionage agreements are altogether forbidden"). *Tenet* carefully distinguished the state-secrets privilege of *Reynolds* from the nonjudiciability rule for suits enforcing espionage agreements: "We recognized [in *Reynolds*] 'the privilege against revealing military secrets, a privilege which is well established in the law of evidence,' and we set out a balancing approach for courts to apply in resolving Government claims of privilege." (*Id.* at 9 (citations omitted) (quoting *Reynolds*, 345 U.S. at 6-7) "[T]he categorical *Totten* bar," by contrast, applies "in the distinct class of cases that depend upon clandestine spy relationships." *Id.* at 9-10. In the present case, the Court of Appeals thus erred when in a dictum it conflated the *Totten/Tenet* bar with the state-secrets privilege. *See McDonnell Douglas Corp. v. United States*, 323 F.3d at 1021. That error, however, in addition to being a dictum, is not within the scope of this Court's grant of certiorari.

B. The Majority View Among the Lower Federal Courts is that the State-Secrets Privilege is a Judge-Made Evidentiary Rule Without Foundation in the Constitution.

Not surprisingly, given how *Reynolds* characterized the provenance of the state-secrets privilege, nearly all of the post-*Reynolds* decisions on point have described the state-secrets privilege as a common-law evidentiary rule. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (the state-secrets privilege as applied in *Reynolds* "is an evidentiary privilege"); *Doe v. Central Intelligence Agency*, 576 F.3d 95, 101 (2d Cir. 2009) ("the Supreme Court [in *Reynolds*] established the procedure by which federal courts police the government's invocation of the common-law state-secrets privilege"); *Al-Haramain*, 507 F.3d at 1196 ("The state secrets privilege is a common law evidentiary privilege"); *In re Sealed Case*, 494 F.3d at 142 ("The state secrets privilege 'is a common law evidentiary rule'"); *Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356, 1358 (Fed. Cir. 2001) (CIA Director's affidavit "invoked the common-law state secrets privilege"); *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) ("the state secrets privilege is an evidentiary privilege rooted in federal common law"); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) ("The state secrets privilege is a common law evidentiary rule"); *In re United States*, 872 F.2d 472,

474 (D.C. Cir. 1989) ("The state secrets privilege is a common law evidentiary rule").

In *Jeppesen Dataplan*, where the Ninth Circuit upheld an assertion of the state-secrets privilege, a six-judge majority of an eleven-judge en banc panel stated that the privilege is "a judge-made doctrine." 614 F.3d at 1092. That statement appeared in the following context:

> *For all the reasons the dissent articulates* – including the impact on human rights, the importance of constitutional protections *and the constraints of a judge-made doctrine* – we do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal.

Id. (emphasis added). The dissent described the state-secrets privilege as "a judicial construct *without foundation in the Constitution*." *Id.* at 1094 (Hawkins, J., dissenting) (emphasis added). Thus, the majority endorsed the dissent's articulation of the state-secrets privilege as *lacking a constitutional basis*. All eleven members of the en banc panel agreed with that articulation.

Congress has likewise viewed the state-secrets privilege as lacking a constitutional basis. In 1972, when this Court transmitted its proposed Federal Rules of Evidence to Congress, the proposal included a rule defining the "secrets of state" privilege. Congress intervened and redrafted the Federal Rules of

Evidence, and in the course of doing so both the House and the Senate described the state-secrets privilege as one of numerous "nonconstitutional" privileges. H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082; S. Rep. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058. (Ultimately, Congress "eliminate[d] all of the Court's specific Rules on privileges" in favor of "a single Rule 501," which "left the law of privileges in its present state." H.R. Rep. No. 93-650, *reprinted in* 1974 U.S.C.C.A.N. at 7082.)[6]

[6] Congress has regulated the state-secrets privilege's invocation in criminal cases via the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 For example, section 6 of CIPA authorizes courts "to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information," *id.* § 6(a), and, upon "any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section," authorizes courts to order "the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would tend to prove" or "the substitution for such classified information of a summary of the specific classified information," *id.* § 6(c).

Similarly, in FISA, Congress has displaced the state-secrets privilege with a comprehensive statutory scheme regulating the use of secret evidence in litigation involving electronic surveillance. 50 U.S.C. § 1806(f); *National Security Agency Telecommunications Records Litigation*, 564 F. Supp 2d at 1124 ("[T]he parties' disagreement over the origins of the state secrets privilege is of little practical significance. Whether a 'clear statement,' a comprehensive legislative scheme or something less embracing is required, Congress has provided what is necessary for this court to determine that FISA preempts or

(Continued on following page)

C. The Confluence of the State-Secrets Privilege and Article II Duties Does Not Give the Privilege a Constitutional Provenance.

A minority view among the lower federal courts ascribes constitutional significance to the state-secrets privilege. In *El-Masri v. United States*, 479 F.3d 296 (2d Cir. 2007), the court observed: "Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities." *Id.* at 303; *accord, Arar v. Ashcroft*, 585 F.3d 559, 581 n.14 (2d Cir. 2009) (quoting *El-Masri*); *see also* Chesney, *supra*, 75 GEO. WASH. L. REV. at 1270, 1309-10 (describing some early pronouncements of the state-secrets privilege as having "constitutional overtones" and suggesting "[i]t might be best, then, to conceive of the state secrets privilege as having a potentially inalterable constitutional core surrounded by a revisable common-law shell"); Brief of Petitioner The Boeing Company at 31 n.10 (citing *El-Masri*).

The court in *El-Masri* relied on *United States v. Nixon*, 418 U.S. 683, 710 (1974), quoting a dictum in *Nixon* which characterized the protection of "'military

displaces the state secrets privilege. . ."); *see also Jeppesen Dataplan*, 614 F.3d at 1092 n.15 ("Congress presumably possesses the power to restrict application of the state secrets privilege").

or diplomatic secrets'" as being within "'areas of Art. II duties [where] the courts have traditionally shown the utmost deference to Presidential responsibilities.'" *El-Masri*, 479 F.3d at 303 (quoting *Nixon*, 418 U.S. at 710). According to *El-Masri*, the Court in *Nixon* "articulated the [state secrets] doctrine's constitutional dimension." *Id.* But *El-Masri* wrongly imbued the state-secrets privilege with a constitutional provenance, by misconstruing the *Nixon* dictum.

Nixon adjudicated an invocation of *executive* privilege, deciding nothing with regard to the state-secrets privilege. The Court explained:

> In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets.

Nixon, 418 U.S. at 710. This explanation is followed by the dictum that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* The dictum places the President's protection of "military or diplomatic secrets" within the "areas of Art. II duties." *Id.*

This dictum merely describes a confluence of the state-secrets privilege and Article II duties in the context of civil litigation, where the privilege, like any

other rule of federal common law, is a means at the President's disposal in the exercise of executive power. The state-secrets privilege is of no more constitutional provenance than any other rule of federal common law: The Judiciary implements those common-law rules as a necessary adjunct of its Article III power to adjudicate cases and controversies, even though the content of those common-law rules is not compelled or determined by the Constitution. Thus, the Executive is free to assert the state-secrets privilege, just as the Executive is free to assert any other privilege or rule of procedure in furtherance of Article II duties, but it is up to the courts to define the privilege and control its application.

The district court in the *Al-Haramain* case made this point when discussing the defendants' argument that the state-secrets privilege has a constitutional basis in Article II. *National Security Agency Telecommunications Records Litigation*, 564 F. Supp. 2d at 1122-24. The court began its discussion as follows:

> *Reynolds* itself, holding that the state secrets privilege is part of the federal common law, leaves little room for defendants' argument that the state secrets privilege is actually rooted in the Constitution. *Reynolds* stated that the state secrets privilege was "well-established in the law of evidence." 345 U.S. at 607, 73 S.Ct. 528. At the time, Congress had not yet approved the Federal Rules of Evidence, and therefore the only "law of evidence" to apply in federal court was an

> amalgam of common law, local practice and statutory provisions with indefinite contours.

Id. at 1123.

Next, the court observed that "all rules of federal common law have some grounding in the Constitution," in that "'[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them.'" *Id.* (quoting *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring)). "Accordingly, all rules of federal common law perform a function of constitutional significance." *Id.*

The court concluded, however, that this feature of the federal common law does not imbue it with a constitutional provenance:

> In the specific context of the state secrets privilege, it would be unremarkable for the privilege to have a constitutional "core" or constitutional "overtones." [Citing Chesney, 75 GEO. WASH. L. REV. at 1309-10.] Article II might be nothing more than the source of federal policy that courts look to when applying the common law state secrets privilege. *But constitutionally-inspired deference to the executive branch is not the same as constitutional law.*

Id. (emphasis added).

In other words, executive protection of state secrets is an Article II power, but invocation of the state-secrets privilege as a means for protecting national security is not the invocation of a constitutionally-compelled rule.

Rather, the state-secrets privilege is a common-law evidentiary rule inspired by policy considerations that predate the Constitution; it is not imposed on the courts by Article II, even though the Executive may invoke it in the course of performing the Executive's Article II responsibilities. Likewise, judicial deference to the Executive's invocation of the state-secrets privilege is constitutionally inspired, but the substance of the privilege is not of constitutional provenance. That is all this Court meant in *Nixon* when observing that the protection of state secrets is within "areas of Art. II duties" to which "the courts have shown the utmost deference." *Nixon*, 418 U.S. at 710.

The state-secrets privilege is not mentioned anywhere in Article II. Indeed, the Constitution has nothing to say about secrecy of any sort, other than to give Congress the power to keep its proceedings secret. *See* U.S. CONST., art. I, § 5, cl. 3. The provenance of the state-secrets privilege lies in the common law, not the Constitution.

♦

CONCLUSION

Should the Court address the provenance of the state-secrets privilege, the Court should conclude that the state-secrets privilege is a common-law evidentiary rule of nonconstitutional provenance.

Respectfully submitted,

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